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IN THE

Supreme Court of the United States

October Term, 1944.

No. 691.

RAILWAY MAIL ASSOCIATION,

Appellant,

against

EDWARD S. CORSI, as Industrial Commissioner of the State of New York, and NATHANIEL L. GOLDSTEIN, as Attorney-General of the State of New York,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S REPLY BRIEF.

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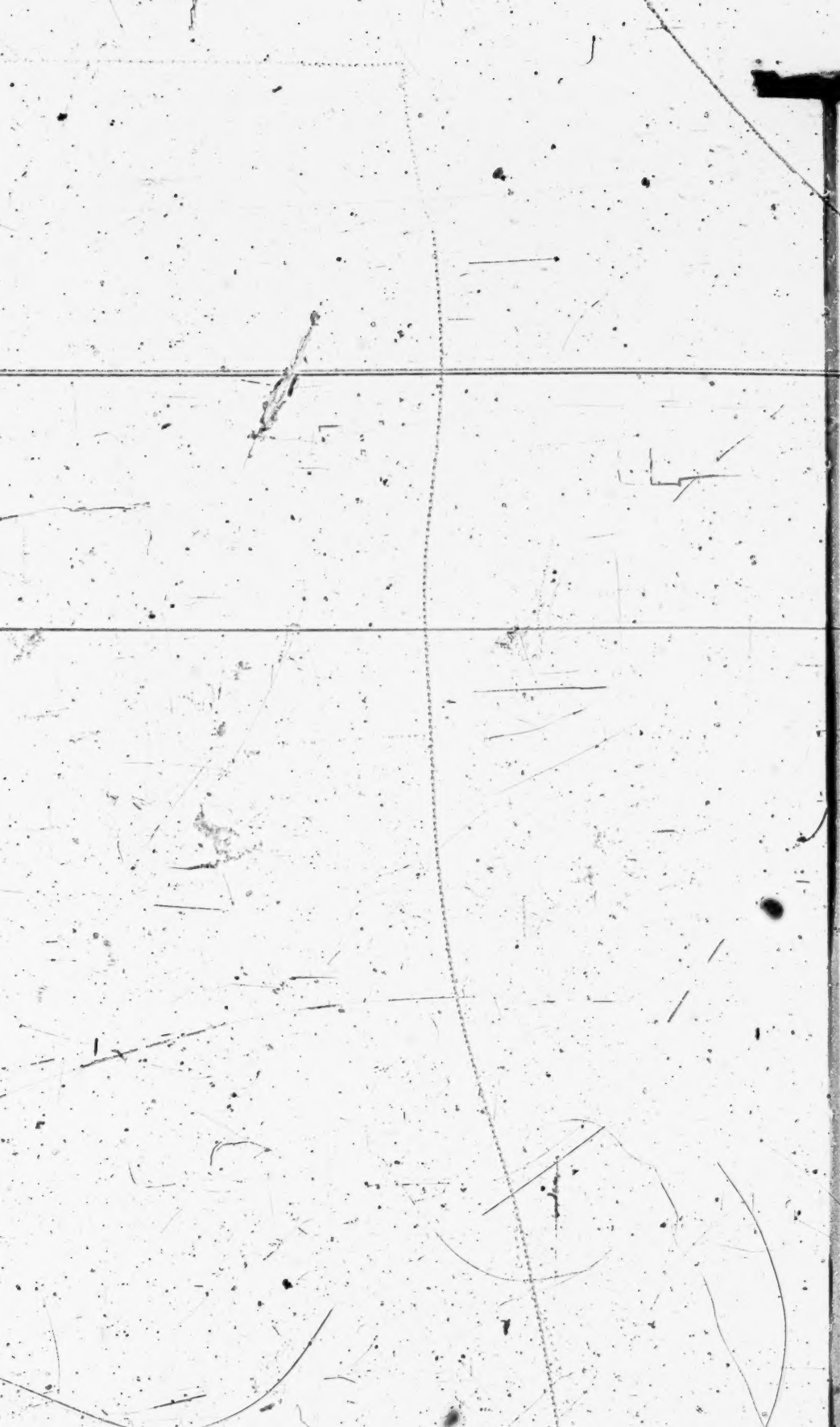

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I.

This reply brief is filed for the purpose of making comment on certain observations contained in the briefs filed in opposition and to call attention to errors in statements made therein.

In the brief for the appellees at page 12 the statement is made: "The fact that anti-discrimination legislation was pending in Congress in 1944, adverted to in the appellant's

brief for the purpose of quoting certain arguments made by *opponents* of the legislation, * * *". There was error in this. The reference is to page 33 of appellant's brief where the following statement is set forth: "In the public hearings held before the House Committee on Labor, witness after witness from various fields of economics, labor relations, social workers, sociologists, and churchmen, *indicating their approval* of the contemplated legislation, made the distinction between social rights and economic rights * * *."

The briefs in opposition lay stress on the statement that racial discrimination in employment in industry was a known evil because it deprived the one discriminated against of his right to equal opportunity under the law and affected his economic condition. The appellant has never raised any issue in this case upon that point and it is made abundantly clear in its briefs filed with this Court and in the State Courts.

The trend of the decisions in the Courts unmistakably indicates that such was the evil which legislation sought to eliminate. All that was decided in the New Negro Alliance case, 303 U. S. 552, was that the controversy there involved constituted a labor dispute and that the Federal Court was without jurisdiction to grant a temporary injunction under the Morris-LaGuardia Act.

In the case of Williams v. Quill, 277 N. Y. 1, cited by appellees on page 11 of their brief, the Court found no evil in a situation created by a collective bargaining contract between the employer and a labor union which provided that the employer would not employ any person in certain groups of workmen who is not or who does not

become, within one month after employment, a member of such labor union, the Court holding such agreement valid where there was nothing to indicate that any injury was sought or intended to present employees of such employer who were not union members. The appellant has no quarrel with the pronouncement attributed to the Court "that legislation might provide the remedy for abuses by labor organizations". The position of the appellant here is that there has not been any abuse of anyone by any act on its part.

Legislation of the character under review in this case possesses a public interest but the element of public interest cannot suffice to deprive the appellant of the right to conduct its business free from arbitrary, capricious and unreasonable legislative regulation or classification.

At page 13 of appellees' brief the contention is advanced that the appellant's position is rested upon a narrow view of the Association's activities and their effectiveness in achieving better employment conditions and the argument is made that "the mere facts that the Association has not yet attained a power over the individual employee comparable with that wielded by some other labor organizations, and that the nature of civil service employment offers a restraint to the attainment of such power are not sufficient". In reply it may be said that if our government is to continue to be governed by law and not by men there will not be given by future legislation any power to the appellant over the individual government employee comparable with that wielded by labor organizations in the field of industry. Civil service employment affords a full guarantee that such power can never be attained by appellant.

Kindred argument is presented in the *amicus curiae* brief of the National Association for the Advancement of Colored People. All the trials and tribulations of labor contentions, strife, conflict and strikes in the field of industry for nearly a century past have been referred to as creating the basis of evil discrimination in the right of the individual because of his color to seek employment in order that he might live, marry and raise a family, acquire property and enjoy equal privileges of public education to advance his offspring to higher culture and to decent physical comfort. The briefs are impressively silent in the revelation of any conflict, strife or strike within the ranks of the Railway Postal Clerks over security and advancement in their governmental positions. As a matter of fact there have been none, and none at all by reason of any attempt on the part of the appellant to frustrate the Federal Civil Service Law.

This brief at pages 16 and 17 quotes from an article entitled "The Black Worker" by Spero and Harris, and in justification of its act says: "Moreover, it is stipulated in the record that any appellate court may consider as exhibits offered by defendants". For the purpose of keeping the record straight it should be noted that this article was not stipulated to be competent evidence but that plaintiff had reserved the right to object thereto. (R. 13.)

There is nothing in the record to show that the appellant had any knowledge of or approved the action taken by the Illinois Branch Association nor that such action of the branch association had any influence with the appointing power which resulted to the detriment of the appointee. It is straining such circumstance out of all proper meaning to give support to the emotional contention that legal

injury has thereby come to any Railway Postal Clerk in his occupation.

In the brief of the American Civil Liberties Union on page 6 the statement is made: "Under the constitution of the plaintiff *aliens* but not negroes are eligible to membership, but the Federal Government is free to do the opposite—to discriminate against aliens and to employ negroes". It is not true that aliens are eligible to membership because an alien cannot enter the classified civil service and those who enter into membership in appellant's organization must be regular or substitute male Railway Postal Clerks whose citizenship is implicit in the classification. The insinuation intended by this passage consequently has nothing to support it.

The *amici curiae* briefs continue the argument as to the labor organization as an institution in the field of industry possessing the power of control by the exercise of economic pressure over the individual not affiliated with the labor movement. They ignore the distinction vital in the case at bar between the economic and the social condition. The manifestly unreasonable economic attitude displayed by the labor organizations in the cases cited and relied on growing out of the strife for economic rights in the industrial field of labor relations furnish neither precedent nor authority for the correct decision in the case at bar.

Section 43 although made part of the Civil Rights Law is neither a definition nor a declaration of civil rights. The section prohibits labor organizations from denying membership because of race, color or creed. The consequences of a violation were liability to criminal prosecution and to

a civil action to recover a penalty. The omission to confer such civil right has been recognized in new and impending legislation. The so-called Anti-racial Act, chapter 118, the Laws of 1945, effective July 1, Section 126, is as follows: "Opportunity for employment without discrimination a civil right. The opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right". While the Fair Employment Practice Act now pending in the Congress by Section 4, declares that the right to work free from discrimination is an "immunity" of the citizens of the United States, which shall not be abridged by any Federal or State agency. (H. R. 2232. Report No. 187 from the Committee on Labor.)

When the act which constituted Section 43 was approved by the Governor no reference was made in his accompanying memorandum to Section 11 of Article 1 of the Constitution of the State of New York adopted in 1938 providing among other things that no person shall, because of race, color, creed or religion, be subjected to any discrimination in his *civil* rights.

It is the natural right of every person to seek employment but it is not the natural right of everyone to seek membership in appellant's organization. The State may declare or define civil rights to include privileges or opportunities which arise out of natural rights. When the State extends civil rights which impinge upon the natural or civil rights of others, the acts constituting the extension are strictly construed. (Burks v. Bosso, 180 N. Y. 341.)

While no reference was made in the Governor's Memorandum to the new clause in the State Constitution, direct

reference was made to the Labor Relations Acts "recently written on the statute books of State and Nation". It was the strife in labor relations arising out of the industrial system which was the evil that the State intended to eliminate. It was unreasonable and arbitrary for the State to make the assumption that there is no difference in labor relations between the field of industry and employment in government service; and to classify Federal Government workers and their labor organizations in the same category with the employee in industry amounted to arbitrary regulation and discrimination.

No benefit ensued to the Railway Postal Clerk by virtue of the Labor Relations Act of the State of New York either in the procurement of his employment or in the security of its continuance. These factors were established by the Federal Government. The case at bar calls for a consideration of Section 43 and the related Sections 41 and 45 and whatever may be the national policy reflected in the setting up of the Fair Employment Practice Committee pursuant to executive Order No. 9346 it has no bearing upon the effect of the Civil Rights Sections herein presented. The Fair Employment Practice Committee Order was an executive directive designed to encourge full participation in the war effort, to get all available manpower into the war industries for the successful prosecution of the war and its foundation was rested upon the declaration that there should be no discrimination *in the employment of any person in war industries* solely by reason of race, creed, color or national origin, and in furtherance of the declared policy and of the Executive Order "to eliminate discrimination in regard to hire, tenure, terms or conditions of employment or union membership, because of race, creed, color or national origin," the Executive

Order recited that there is evidence that available and needed workers have been barred from employment in industries engaged in war production solely by reason of their race, creed, color or national origin, to the detriment of the prosecution of the war, the workers' morale and national unity and declared the intention of the President to reaffirm the policy of the United States that there shall be no discrimination in the employment of any person in war industries or in government by reason of race, creed, color or national origin and that it shall be the duty of all employers including the several Federal departments and agencies, and all labor organizations in furtherance of this policy and of this Order to eliminate discrimination in regard to hire, tenure, terms of employment, or union membership because of race, creed, color or national origin.

The mandate of the Order is contained in the following paragraphs thereof:

> "1. All contracting agencies of the Government of the United States shall include in all contracts hereafter negotiated or renegotiated by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin and requiring him to include a similar provision in all subcontracts.
>
> "2. All departments and agencies of the Government of the United States concerned with vocational and training programs for war production shall take all measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin." (Executive Order No. 9346.)

The earlier Executive Order, No. 8802, indicates the fundamental purpose that there shall be no discrimina-

tion in the employment of workers in defense industries or government because of race, creed, color, or national origin and declared in furtherance of said policy and of the Order that it is the duty of employers and of labor organizations to provide for full and equitable participation of all workers in defense industries without discrimination because of race, creed, color, or national origin.

James v. Marinship Corporation, 155 Pac. Rep. 2d Series 329, was an action arising out of labor relations in the field of industry where a labor union having a closed shop contract with the employer denied membership to workers in the craft because they were negroes. The negroes were forced out of employment and deprived of the opportunity to work whereby they suffered in their civil rights and sustained legal injury for which redress was sought in the action. The decision rested upon this fundamental point, the Court saying:

> "In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by names of closed shop agreements and other forms of collective labor action, such a union occupies a *quasi* public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. See Newman, The Closed Union and the Right to work (1943), 43 Col. L. Rev. 42, 44; Northrup, Organized Labor and the Negro (1944), 238-239; Chaffee, The Internal Affairs of Associations (1930), 43 Harv. L. Rev. 993, 1021-1023; Mintz, Trade Union Abuses (1932), 6 St. John's L. Rev. 272, 274-276; (1941) 40 Mich. L. Rev. 310."

The question presented in the case at bar was not passed upon by the California Court, which at page 342 of its opinion says:

> "Under the circumstances of this case, it is unnecessary to determine whether or not the union, in absence of a closed shop agreement, would be required to open its doors to all qualified employees."

The appellant is conscious of the fact that this cause comes to the Court at a critical time when the emotions aroused by agitation are apt to run high and assumptions are drawn in exaggeration; when economic welfare is the goal of all and propaganda is all agog over proposed legislation to curb discrimination in employment because of race, creed, color, national origin, or ancestry. In signing the so-called anti-racial bill, passed by the Legislature of the State of New York, Governor Dewey is reported to have said:

> "It must not be understood that the state is here attempting to impose itself as arbiter of social or personal likes or dislikes. By this act the State declares the simple principle that in employment there shall be no discrimination by reason of race, creed, color or national origin. It expresses the rule that must be fundamental in any free society—that no man shall be deprived of the chance to earn his bread by reason of the circumstances of his birth."

Where in this record does less appear?

II.

These briefs cite cases from this Court dealing with the dual powers of the Federal and State Governments under the Interstate Commerce Clause where separate powers exist within State borders when local law within the police

power may not conflict with federal regulation or where, in the absence of federal regulation, the local law may not be an obstruction or hindrance to interstate commerce. But as has been pointed out in appellant's brief the post office and post roads clause is comprehensive and exclusive and the validity of the local law is not a question of degree of the interference or regulation but rests on the question of the power of the State to make it at all.

Before entering upon his duties every Railway Postal Clerk and all persons employed in the postal service are required to take and subscribe to the following oath:

> "I, A. B., do hereby solemnly swear (or affirm, as the case may be,) that I will faithfully perform all the duties required of me and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear (or affirm) that I will support the Constitution of the United States; so help me God." (Section 365, Title 5, Executive Departments; R. S. Sections 391, 392, March 5, 1874, c. 46, 18 Stat. 19.)

The hearings before the Congressional Committees in relation to the Lloyd-LaFollette Bill, which became the Act of August 24, 1912, c. 389, Section 6, 37 Stat. 555, gave a dismal history of the cumulative grievances of workers in the postal service generally and particularly in the division of the Railway Mail Service. These grievances covered every factor in the postal employment such as working conditions, hours, salary adjustments and promotions and furnished a sordid revelation as to the "gag" rules adopted by the Post Office Department on many occasions from time to time which in order to limit and oppose the right of the postal employee to improve his condition placed unreason-

able restriction upon his right of expression and his right, individually and collectively, to petition to the Congress for redress of his grievances. Such redress in a measure came from the enactment of the Lloyd-LaFollette Bill. (See "The Labor Movement in a Government Industry" by Spero, Chapter VII, *et seq.*)

It is respectfully submitted in conclusion that this should conclusively establish that the activities of the Railway Postal Clerk in relation to his duties and service have been immunized against the regulation imposed by Section 43 of the Civil Rights Law of the State of New York.

March, 1945.

DANIEL J. DUGAN,
Counsel for Appellant.